Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALLEN V. JAFFE,

Petitioner,

v.

VIRGINIA PHOTOTHERAPY, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CENTIORARI TO THE SUPREME COURT OF VIRGINIA, CITY OF RICHMOND

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This court should grant certiorari to clear up confusion as to whether during a motions hearing the courts must consider whether the party asserting Res Judicata must present evidence to prove by a preponderance that the issues asserted as bars were previously raised so as to assure a fair and impartial hearing guaranteed under the 14th amendment.

2. This court should grant certiorari and decide whether on plea of Res Judicata, the courts must consider whether a lower court judge in a current action may simply take judicial notice of the record in previous actions and dispense with the necessity of proof of record of those previous actions in which that same judge presided, in determining the outcome of the current matter before.

3. This court should grant certiorari to decide whether the court must consider whether the dismissal of a matter for lack of jurisdiction under the Virginia Medical Malpractice Act may serve as a bar under Res Judicata to future actions.

4. This court should grant certiorari and decide the most fundamental issue of fairness and impartiality guaranteed under the 14th with regard to whether a lower court judge on motion to disqualify for bias and prejudice, does in fact disqualify and recuse themself from those matters to which recusal had been sought then , should that judge be able to affect the determinations of those matters from which they are then barred.

5. This court should grant certiorari and decide whether on a petition for appeal, a higher court should consider an appellant's submitted statement of facts, in lieu of transcripts, when all the requirements necessary for admission of that statement of facts have been satisfied, but for the lower court judge's refusal to sign, or amend and sign such statement for admission when such a refusal serves to defeat the appellant's right of appeal.

6. This court should grant certiorari and decide whether in denying an appeal, the court should have considered an order correcting Nunc Pro Tunc, a previous fraudulent order, as being Nunc Pro Tunc to the *date of the original final order so as not to affect an appellant's right of appeal* with regard to *the determination of appellate jurisdiction and filing time requirements*.

PARTIES TO THE PROCEEDING

Petitioner is Allen V. Jaffe, pro se, who was the plaintiff, pro se, in the circuit court, and the appellant, pro se, before the Virginia Supreme Court.

Respondent is Virginia Phototherapy, L.L.C., a Virginia limited liability company which was the defendant in the Circuit Court and the appellee before the Virginia Supreme Court.

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Petitioner respectfully petitions for a Writ of Certiorari to review the judgements of the Circuit Court and the Supreme Court of Virginia.

OPINIONS BELOW

The opinion of the supreme court of Virginia record no. 030874 concerning the circuit court matter styled CL02-1730-00 dated June 25, 2003, denying Allen v. Jaffe's direct appeal is attached as appendix A, the order denying Jaffe's petition for rehearing dated September 12, 2003, is also attached as appendix D. The circuit court fraudulent order submitted by the defendant, is attached as appendix C, and the corrected legitimate order signed on April 29, 2003, is attaches as appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of the court is invoked under 28 U.S.C. § 1257, which states that writs will be issued from "final judgements and decrees rendered by the highest court of a state in which a decision could be had." Petitioner had originally planned to base his appeal on numerous ruling errors committed during the hearing on January 24, 2003, which he expected to be memorialized in the order submitted by the defendant/appellee counsel, but conflicts which resulted from the fraudulent order submitted by the appellee counsel and the exclusion of a properly submitted Statement of Facts because of the refusal of the judge to sign it, served to defeat appellant's Right of Appeal.

In an article entitled, "Commentary on 1988 revision," appearing after 28 U.S.C. § 1257, David Siegel observed that the statute governing Writs of Certiorari to state courts allows

review of "not just a decision of the highest court in which a decision could be had." Observing that this language was the same as what appeared before the 1988 revisions, Mr. Siegel said it "takes note of the internal strictures a state may impose on appeals within its own court system, perhaps stopping a case at some lower level and barring it from review by the state's highest court. A lower federal court has held that, where a higher state court is by constitution or statute without power to review a decision of a lower court, the decision of the lower court becomes the decision of the highest court within the meaning of 28 U.S.C. §§ 1257, giving the United States Supreme Court power to review final judgements by the highest court of the state in which a decision could be had, *U.S. ex rel. Carrono v. Richmond*, 177 F. Supp. 504 (D. Conn. 1959). The Supreme Court granted Certiorari in *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970) to an intermediate appellate court which had affirmed a trial judge's enforcement of the Florida Supreme Court's criminal procedural rule concerning the alibi defense in order to decide whether the rule passed constitutional muster. It could not be stretch anyone's imagination to realize a court which issued a body of rules, such as the guidelines in question here, would be unimpressed with an argument challenging the Constitutionality of the court imposed rule. As is the case presented herein, the State's Supreme Court lacked jurisdiction to hear Williams after the district court of appeal had affirmed.

In this current matter before this court, so was Allen Jaffe denied an appeal because the higher court in failing to comply with it own rules, refused to recognize the appellant's corrected order as being Nunc Pro Tunc, the consequence being the court invalidated the order based on improper jurisdiction, which as a result served to defeat appellant Jaffe's right to appeal.

Additionally, that same failure of the court to follow its own rules permitted the refusal of the lower court judge to sign a properly submitted statement of facts in lieu of transcripts. The lack of which resulted in the statement not being admitted and served to defeat the appellant's right of appeal because the Virginia Supreme Court in denying the petition for appeal ruled that "a transcript or written statement of facts is necessary to determine whether the appellant stated objections with reasonable certainty at the time of the ruling as required by rule 5:25."

Pursuant to the denial of the petition for appeal, Allen V. Jaffe subsequently filed a petition for hearing which was subsequently denied on September 12, 2003.

This court now has jurisdiction under title 28 U.S.C. 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented implicate the following provisions of the United States Constitution:

Amend. XIV

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall bridge the privilege or immunities of citizens of the united states; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(a)

States in pertinent part:

> Final judgements or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the supreme court by writ of certiorari where the validity of a treaty or statute of the united states is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the united states. . . .

Virginia Code 16.1-93

States in pertinent part:

> Every action or other proceeding in a court not of record shall be tried according to the principles of law and equity, and when the same conflict the principles of equity shall prevail. No warrant, motion or other pleading shall be dismissed by reason of a mere defect, irregularity or omission in the proceedings or in the form of the pleadings and enter such orders as may be necessary to correct any such defects, irregularities and omissions, and to bring about a trial of the merits of the controversy and promote substantial justice to all parties. . . .

Virginia Code 8.01-272

States in pertinent part:

> In any civil action, a party may plead as many matters, whether of law or fact, as he shall think necessary. A party may join a claim in tort with one in contract provided that all claims so joined arise out of the same transaction or occurrence. The court, in its discretion, may order a separate trial for any claim.

Virginia Code 8.01-275

States in pertinent part:

> No action or suit shall abate for want of form when the Motion for Judgement or Bill of Complaint sets forth sufficient matter of substance for the court to proceed upon the merits of the cause. The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed misleading or insufficient pleading or not, unless there be omitted something so essential to the action or defense that judgement, according to law and the very right of the cause, cannot be given.

Virginia Code 8.01-428(b)

States in pertinent part:

> Clerical mistakes in all judgements or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order.

STATEMENT OF THE CASE

Allen V. Jaffe, pro se, filed a civil action in Henrico Circuit Court on September 13, 2001, styled *Allen V. Jaffe v. Virginia Phototherapy, L.L.C.*, case no. CL01-1543, the single defendant, Virginia Phototherapy, L.L.C., is a Virginia limited liability company, with its place of business at 5700 Old Richmond Avenue, suite E 21, Richmond, Virginia 23226.

The action styled case no. CL01-1543, sought relief against Virginia Phototherapy, L.L.C., for its failure to permanently remove plaintiff's unwanted hair as they advertised and promised. They advertised permanent hair removal using an FDA controlled medical device by the name of "Epilight", which the defendant alleged and advertised was approved and effective for use in permanent hair removal. The action sought recovery for monies paid as well as damages for pain and suffering.

Shortly after filing case no CL01-1543, Allen V. Jaffe discovered that the medical device they had advertised as FDA approved for permanent hair removal, had in fact, *not been approved for the purpose they had advertised and for*

which it was used. The device was illegally advertised and its use was adulterated contrary to regulations of the food and drug administration act. The fact that the device had not been approved for permanent hair removal meant that the device as they used it, could not have produced the results they advertised and promised no matter how many times the treatments were performed, whether 50 or 1,000 times. The FDA as part of its approval, had determined that the device was not capable of producing "permanent hair removal".

Because Virginia Phototherapy, L.L.C., knew or had to know that the Epilight device would not and could not permanently remove the plaintiff's hair and yet they lied and deceived him, intending him to suffer the unnecessary torture of the treatments; and because the plaintiff believed that Virginia Phototherapy, L.L.C. was a health care provider and subject to the Virginia Medical Malpractice Act, the plaintiff was forced to split his claim and filed an additional and separate cause of action for medical malpractice against the single defendant Virginia Phototherapy, L.L.C. styled case no. CL01-2094.

The defendant responded by filing a demurrers and special plea. The plaintiff, pro se, attempted to file cross motions and arguments, but the judge refused to hear those arguments or motions over the Jaffe's objections.

During the motions hearings the judge made it impossible for the plaintiff to correct his pleadings to satisfy any defects in his pleadings because Judge Hammond issued an *order* precluding the plaintiff from filing any future motions to amend his actions if necessary, contrary to the Virginia Code 16.1-93 and 8.01-275. The plaintiff. Allen V. Jaffe timely objected to all those and other improper rulings, but those objections were overruled.

During the proceedings, it is vitally noteworthy to mention that the judge continually chided the plaintiff for not having and attorney, and reminded him that "this is what happens when you represent yourself".

Neither cases were judged on their merits. In the matter of case CL01-1543 defendant argued that the matter was duplicative of CL01-2094. the judge in turn affirmed that argument over plaintiff's objection, contrary to 8.01-272 and 16.1-93 of the Virginia Code, and forced the plaintiff to choose between the two matters (even though the plaintiff had submitted a motion to consolidate and which she denied) *if Jaffe* wanted to proceed with his action.

Basing his reluctant decision on language and affirmations by the defendant that they were health care providers and therefore actionable under the medical malpractice act, the plaintiff chose to proceed with the medical malpractice action styled CL01-2094. following his reluctant election, the matter styled CL01-1543 was dismissed over plaintiff's objections for being duplicative of CL01-2094.

At that point the judge instructed the parties to proceed on CL01-2094 and to set a trial date and proceed to establish pre-trial procedures. The trial date was set for October of 2002 and the pre-trial procedures were initiated.

Shortly after the trial date was set, the defendant then filed a demurrer and special plea seeking dismissal on grounds that Virginia Phototherapy, L.L.C. was not a health care provider under the Medical Malpractice Act, and Jaffe was not a patient of Virginia Phototherapy, L.L.C., therefore the company was not actionable under its provisions.

The defendant's pleadings were misleading and consequently, but in spite of the numerous objections of Allen V. Jaffe, the judge dismissed the action for lack of jurisdiction.

Following dismissal of the medical malpractice cause of action for lack of jurisdiction, Jaffe, subsequently, under the proper jurisdiction filed the personal injury cause of action styled CL02-1730, against Virginia Phototherapy, L.L.C., which is this matter appealed.

Simultaneously, the appellant Allen Jaffe, filed a medical malpractice action against the Virginia licensed physician Dr. Ronald Mark Landess, DPM, as the designated physician in charge and personally responsible for performing the Epilight treatments as stipulated in the patient doctor consent form signed by Jaffe.

While the matters of CL01-1543 and CL01-2094, were presided on by Judge Hammond, those cases were not decided on their merits in particular CL01-1543 was dismissed as a result of the judge's bias and prejudice contrary to the code of Virginia statutes 8.01-272, 8.01-275 and 16.1-93; and CL01-2094 was dismissed because the court ruled the lack of jurisdiction regarding the application of the medical malpractice act to a non-healthcare provider, yet the defendant seeks to use those dismissals as bars to deny Allen v. Jaffe his right to justice under the constitution.

As a result of the improper rulings, the plaintiff filed a written complaint against Judge Hammond with the judiciary committee, but was told there was nothing they could do.

Plaintiff's current matter which is the subject of this appeal, styled CL02-1730 against Virginia Phototherapy,

L.L.C., is for numerous torts actionable under the theories of personal injury and product liability. The previous matters CL01-1543 and CL01-2094 are not duplicative of CL02-1730, nor were they properly adjudicated and may not serve as bars under the Doctrine Of Res Judicata.

In response to case no. CL02-1730, the matter now under appeal, the defense filed numerous pleas and motions, among which was a special plea of Res Judicata.

In response to defense motions and pleas, plaintiff filed a motion to strike the special pleas ; and, upon discovering that Judge Hammond had been assigned to the matter styled CL02-1730, plaintiff Allen V. Jaffe also *filed a motion to disqualify Judge Hammond for prejudice and bias.*

A motions hearing was held on January 24, 2003, and during the motions hearing which *lasted approximately 15 minutes*, the judge after careful consideration, *granted the plaintiff's motion to disqualify and she recused herself from cases CL02-1729 and CL02-1730.* then without reason, over the plaintiff's most vocal objections, *continued to preside over those same matters over which she had recused herself.*

The judge, after recusal, and without the presentation of evidence or testimony, prejudicially sustained the defendant's special plea of Res Judicata and dismissed the action styled CL02-1730, once again, over the plaintiff's objections. The judge then continued with additional improper rulings as follows:

(a) Denied all parties motions for sanctions.

(b) In action CL02-1729, denied defendant's plea of privity.

(c) Upon suggestion by the defendant as to the appropriateness of rendering decisions after her recusal, the judge withdrew her previous order denying defendants plea of privity in CL02-1729 and ordered that the matter be remanded for hearing by another judge.

Once again plaintiff noted his objections to the rulings, and relying on the improprieties and error of the judge's post recusal adjudications, stated his intention to appeal.

Based upon the oral rulings of judge Hammond during the motions hearing and believing that the order would accurately reflect and memorialize them, the plaintiff filed his Notice of Appeal to the Supreme Court of Virginia on February 7, 2003.

The plaintiff was never sent a copy of the final order which was prepared by the defendant counsel and submitted to the judge for signing. Consequently the plaintiff Allen V. Jaffe was never provided an opportunity to see, review and challenge the order within the 21 days permitted by the court rules. Unfortunately it was not until after the 21 days that the plaintiff managed to get a copy of the signed order by going to the Henrico County Courthouse and paying a $3.00 fee.

When the appellant Allen Jaffe examined the order, he discovered that the judge's most crucial ruling granting Allen Jaffe's motion to disqualify was deliberately omitted as well as other portions of her rulings. In order to correct the order back to the date of the ruling, appellant Allen Jaffe filed a motion to correct Nunc Pro Tunc, and also provided a sketch order designating the corrections. Thereafter, a motions hearing on plaintiff's motion to correct Nunc Pro Tunc was noticed for April 4, 2003.

The defendant during the hearing on April 4, 2003, on Jaffe's motion to correct Nunc Pro Tunc, although being fully aware that the order they submitted was incorrect and fraudulent, objected to any changes to correct or modify the improper order citing the 21 day rule. The judge as outlined in her order dated April 29, 2003, overruled the defendant's objection and even chided the defense counsel for the failure to provide a copy of the order to the appellant and the failure to certify that such a copy was sent to the plaintiff. The judge chastised the defense and went on to point out that the order as they had prepared it was grossly incorrect in that the submitted order omitted most of her rulings. The judge then she granted the plaintiff's motion to correct the order Nunc Pro Tunc and subsequently wrote the correct order to reflect her true rulings and intentions in the matter.

The judge drafted and signed her own order granting the motion to correct Nunc Pro Tunc, but the order was captioned final order rather than Nunc Pro Tunc and included the judges refusal to sign the presented statement of facts in lieu of transcripts. The mistake in the caption of the order created a timeline jurisdictional issue which served to defeat the appellant's right of appeal.

The petition for appeal was filed on April 21, 2003 and according the Virginia Supreme Court order dated June 25th 2003, it appears the petition was denied because the court did not recognize the order Nunc Pro Tunc correcting the order issued January 24, 2003; the confusion of which was created by the defendants initially submitted fraudulent order. It also appears that the denial was based on the lack of a statement of facts by the defendant which was the result of the lower court judge's refusal to sign or amend and sign the statement of facts which was properly submitted by plaintiff.

In response to the dismissal, the appellant filed a petition for rehearing and addressed those issues on which the Supreme Court appeared to have based their dismissal; however, the Petition For Rehearing was also denied and as prescribed by law, the matter was noticed for appeal to this the Supreme Court of the United Stated under a Special Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

1. In order to sustain a plea of Res Judicata, the party asserting the defense must present evidence and witnesses to support by a preponderance of the evidence those assertions. Absent such evidence that party may not prevail to defeat the other parties right to a fair and impartial hearing on the merits of the action as guaranteed under the 14th amendment.

The proponent of Res Judicata has the burden of proving by a preponderance of the evidence that an issue was previously raised and decided in an appropriate court in a prior cause of action.

The defender of Res Judicata must prove by a preponderance of the evidence the following: (1) the identity of the things sued for; (2) the identity of the causes of action; (3) the identity of the persons and parties to the actions; and (4) the identity of the quality in the persons for or against whom the claim is made.

It has long been established that the above four elements must be present before Res Judicata can be asserted to bar a subsequent proceeding, *Wright v. Castles*, 232 Va. 218, 222, 349, S.E.2d 125, 128 (1986); *Mowry v. City of Virginia Beach*,

198 Va. 205, 211, 93 S.E.2d 323, 327 (1956); *Highsmith v. Commonwealth*, 25 Va. App. at 440, 489 S.E.2d at 241; *Wright v. Castles*, 232, 349 S.E.2d at 128.

While the admissions in the pleadings or the stipulation of counsel may dispense with the necessity of the entire record in certain cases, generally only an inspection of the entire record in the previous action will disclose whether the identities in controversy in the pending suit was settled between the parties.

In the present case it is difficult to see how it can be determined except from the complete record of the former proceedings whether the defendant was improperly named and whether the plaintiff's individual rights under personal injury had been actually litigated and decided. 50 C.J. S., Judgements, sec. 771, pp. 300, 301; 30 Am Jur., Judgements, sec. 224, pp. 956,957.

The basis of this principle is that the conclusiveness of the prior adjudications upon the issue sought to be retried depends not upon whether the judgement was subject to review, *but upon whether it was a final determination by a court, which had jurisdiction of the subject matter and of the parties, of the identical issue and between the same parties before the court in the subsequent litigation. Johnson Steel Street Rail Co. v. William Wharton, Jr., & Co.*, 152 U.S. 252, 261, 14 S. Ct. 608, 38 L. Ed. 429.

The plaintiff/appellant holds that the judge in the previous matters erred in sustaining Res Judicata and dismissing the action because no evidence at all was presented during the 15 minute hearing that would in any way support any assertion of Res Judicata. No evidence was

introduced or allowed to prove that the matters were decided with finality by a court which had jurisdiction of the subject matter of the parties, the identity of the remedies sought, the identity of the causes of action, or identity of the quality of the persons for or against.

2. A judge may not in a present matter take judicial notice of the records in previous actions and dispense with the necessity of proof of the content of the records of those previous actions even though the same judge may have presided over those previous actions.

The general rule is that the court will not travel outside the record of the case before it in order to take notice of the proceedings in another case, even between the same parties and in the same court, unless the proceedings are put into evidence. The reason for the rule is that the decision of a case must depend upon the evidence introduced, if the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case at hand, conclusive against the opposing party, while if they had been properly introduced they might have been met and overcome.

Regardless of the fact that previous actions were presided over by the same judge in the same court, a plea of Res Judicata does not permit the judge to dispense with the necessity of proof of record in the previous actions. To sustain a claim of Res Judicata, the court will not take notice judicial of the record in the first suits (30 Am Jur., Judgements, Sec. 273, p. 993; 50 C.J.S., Judgements, sec. 836, p. 404.) it is appropriate to point out that ordinarily to sustain the allegation of Res Judicata, the whole record of the former proceedings must be put in evidence (*See* Freeman on

Judgements. 5th Ed., Sec. 1030. pp. 2147, 2148; Jones' commentaries on evidence, 2d Ed., Sec. 1886, p. 3514; 30 Am Jur., Judgements, sec., 274, p. 993; 50 C.J.S., Judgements, Sec. 843-c, p. 417). Generally, only an inspection of the entire record in the first actions will disclose whether the identical issues in the controversies in the pending suit was settled in the previous litigations. Generally a court must review the entire record of the previous case to determine whether the judgement is Res Judicata (*DeCancino v. Eastern Airlines, Inc.*, 283 S.2d 97 (Fla. 1973)).

The fact that the adjudication relied upon by the appellee was made by the same judge who then sustained the plea of Res Judicata is not sufficient. Individual and extrajudicial knowledge on the part of the judge will not dispense with the proof of the facts not judicially cognizable, and cannot be resorted to for the purpose of supplementing the record. The consideration of facts outside of and not made part of the record is improper. *Newton v. Newton*, 202 Va. 96, 116 S.E.2d 94 (1960); *Darnell v. Barker*, 179 Va. 86, 18 S.E.2d 271 (1942).

Nevertheless, Virginia Phototherapy, L.L.C., the defendant/ appellee sought in the case under review to rely affirmatively upon the facts which were allegedly determined in the prior proceedings brought by it against this appellant Allen V. Jaffe. Virginia Phototherapy, L.L.C., alleged those prior determinations as bars to appellant's motion for judgement although Virginia Phototherapy, L.L.C. neither filed the record as an exhibit with its plea, nor offered it in evidence at the January 24, 2003 motions hearing. Such failure to do so is fatal for "whether the former adjudication is affirmatively or defensively asserted, the record of the prior action must be offered in evidence". Burk's pleading and practice, § 357 at 675 (4th ed. 1952).

During the motion hearing on January 24, 2003, no proof of the whole records of the previous actions on which the plea of Res Judicata was relied upon, were put into evidence for inspection in order to support any claims of identity of issues in controversy which were alleged to have been settled in the previous litigations. Without those records in evidence to inspect and compare, the judge was not permitted to dispense with the necessity of the proof of those whole records in those previous actions. Lacking the introduction of such proof, the defendant failed to satisfy the evidentiary requirements necessary to sustain the plea of Res Judicata; and for those reasons the trial court erred in sustaining the plea of Res Judicata and dismissing the action now under appeal.

The brief time period of 15 minutes in which all the motions were heard demonstrates how summarily the Henrico County Circuit Court treated plaintiff's arguments and shows how his constitutional claims and his right to a fair hearing were not seriously considered.

Without the introduction of the records of the prior cases into evidence, the burden of proof was not met and therefore the plea of Res Judicata should not have been sustained and accordingly, the action of the lower court should be reversed and the matter being appealed should be remanded with direction that it be reinstated on the docket of the original court for trial on its merits.

3. The defender of Res Judicata must prove by a preponderance of the evidence the following: (1) the identity of the things sued for; (2) the identity of the causes of action; (3) the identity of the persons and parties to the actions; and (4) the identity of the quality in the persons for or against whom the claim is made.

It has long been established that the above four elements must be present before Res Judicata can be asserted to bar a subsequent proceeding, *Wright v. Castles*, 232 Va. 218, 222, 349, S.E.2d 125, 128 (1986); *Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956); *Highsmith v. Commonwealth*, 25 Va. App. at 440, 489 S.E.2d at 241; *Wright v. Castles*, 232, 349 S.E.2d at 128.

The judge erred in applying the doctrine and dismissing the action because no proof of any of the required identities in the previous actions, asserted as bars, were ever presented and entered that would support any claims asserted.

4. A matter dismissed for lack of jurisdiction under the Virginia Medical Malpractice act may not serve as a bar to the assertion of future actions under the proper jurisdiction.

During all times relevant to the filing of the action which was dismissed for lack of jurisdiction, the plaintiff believed that the defendant/appellee Virginia Phototherapy, L.L.C. was a healthcare provider governed by the Virginia Medical Malpractice Act and as such filed the action against the single defendant Virginia Phototherapy, L.L.C. It is well settled that the pursuit of a remedy which a party may think himself entitled to, but to which it develops he is not, does not bar the bringing of a suit on the remedy which does exist. *Northern Assurance Co. v. Grand View Building*, 203 U.S. 106; *Bierce v. Hutchins*, 205 U.S. 341; *Southern Pacific Co. v. Bogert*, 250 U.S. 483; *Bistline v. United States*, 229 Fed. 546.

In the Bistline rule when the united states filed its bill in equity to secure the cancellation of the patents, it was met with a plea by the defendants that the suit was barred because

not brought within six years from the date the patents were issued. The government asserted that the suit was not barred because it was brought within six years after it had received notice of fraud. The case went to trial and the court held the suit barred because the united states had notice of the fraud more than six years before suit was filed. It therefore dismissed the bill on that ground. It was very clear therefore, that when the suit in equity was filed the united states did not have a right to the remedy therein sought, namely, the cancellation of the patents. Hence its course in pursing that supposed remedy does not bar the prosecution of the present suit at law to recover the value of the land.

It is no answer to that proposition to say that when the suit was brought the facts respecting notice were known, or, to be exact, that knowledge was chargeable to the united states. Granting that they were known, whether those facts constituted such notice as would operate to set the statute of limitations in motion was a question of law, and because the United States thought the statute not applicable, would not mitigate against the prosecution of the present suit, its mistake being due to an erroneous view of the law.

The law has not gone so far as to deprive parties of meritorious claims merely because of attempts to collect them by inappropriate action, upon which recovery could not be had. *McLaughlin v. Austin*, 104 Mich. 489, 491. If the rule were otherwise, a mere mistake of judgement would result in depriving one of valuable rights. *Agar v. Winslow*, 123 Cal. 587. The instant case resembles *Bistine v. United States*, 229 Fed. 546. *See Tullos v. Mayfield*, 198 S.W. 1073; *Stone v. Robinson*, 218 S.W. 5.

The fact that the defendant was not actionable under the Virginia Medical Malpractice act and therefore dismissed, the action being dismissed merely barred the remedy but did not extinguish the right of Allen V. Jaffe to recover for his injuries

Again, the fact that Allen V. Jaffe pursued his action under medical malpractice when met with the plea in bar, does not make the Judgement Res Judicata in the instant suit, for the sole question decided there was the applicability of the Virginia Medical Malpractice Act. That was no adjudication of the rights of Allen V. Jaffe but only of the availability of the remedy. The Virginia Medical Malpractice Act affects the remedy, not the merits. *Townsend v. Jemison*, 9 How. 406; *Mcelmoyle v. Cohen*, 13 pet. 312. *A judgment not on the merits is not Res Judicata. Cromwell v. County of Sac*, 94 U.S. 351.

5. A lower court judge upon recusal pursuant to a motion to disqualify for bias and prejudice may not be able to affect the determinations of those actions from which disqualification and recusal have been granted.

As a general matter, the courts have almost uniformly held that a trial judge who has recused herself "should take no other action in the case except the necessary ministerial acts to have the case transferred to another judge." *El Fendix de Puerto Rico v. The M/Y Johanny*, 36 F.3d 136 at 141 (1st Cir. 1994). 13a Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3550, at 629 (2d 1984); *see also Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *Arnold v. Eastern Airlines, Inc.*, 712 f. 2d 899, 904 (4th Cir. 1983); *In Re Cement Antitrust Litigation*, 673 F.2d 1020, 1025 (9th Cir. 1982); *Rohrbach v. AT&T*

Nassau Nassau Metals Corp., 915 F. Supp. 712, & N.5 (M.D. Pa. 1996); *Whitehead v. Nevada Commission on Judicial Procedure*, 920 P. 2d 491, 502-03 (Nev. 1996).

Surely it would be improper for a judge to decide the issues of a case in which he or she had recused themselves if this decision violated the litigant's constitutional right to be heard by a neutral and detached judge or it undermined the publics confidence in the impartiality of the judicial process. *See Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.. 847, 858 N.7 & 861, 108 S. Ct. 2194, 2201 N.7. 100 L. Ed. 2d 855 (1988) (noting that a judge is called upon to take the steps necessary to maintain public confidence in the impartiality of the judiciary); *Ward v. Monroeville*, 409 U.S. 57, 62, 93 S. Ct. 80, 84, 34 L. Ed. 2d 267 (1972) (stating that due process guarantees litigants a neutral and detached judge.)

As a consequence it was error for the judge to have affected the outcome of this matter under appeal by sustaining the plea of Res Judicata and dismissing the action. In light of the foregoing, the appellant was denied his right to equal protection and a fair trial.

6. On a petition for appeal from a circuit court motions hearing, absent a transcript, the appellate court should consider an appellant's statement of facts when all the requirement for admission have been satisfied, but for the judge's refusal to sign or amend and sign the statement for admission.

The admission of the statement of facts is necessary to an accurate and complete history of the proceedings in the trial court and the appellant should not be made to suffer for the faults of the court.

The appellant Allen V. Jaffe complied with rule 5a:8(c) and (d) which state that a written statement becomes a part of the record when: (1) it is filed in the office of the clerk of the trial within fifty-five (55) days after entry of judgement, to which the appellant Allen V. Jaffe complied; (2) a copy of the statement is mailed or delivered to opposing counsel along with a notice that the statement will be presented to the trial judge within the specified time period to which the appellant also complied; (3) the trial judge signs the statement and the signed statement is filed in the office of the clerk. The judge however, refused to sign or offer to amend and sign the statement.

In *Eugene H. Proctor, Jr. v. Town of Colonial Beach*, 425 S.E.2d 818, 15 Va. App. 608, Va. 0734 it was held that the

> requirement does not provide a means by which the trial judge, through design, inattention or inadvertence, may thwart an appeal by neglecting or refusing to sign the statement of facts. For these reasons, we hold that, once the appellant has complied with the first two elements of rule 5a:8(c), he or she has established prima facie compliance with the requirements of the rule. Thereafter, the trial judge must sign the statement, correct the statement and sign the corrected statement, or, in cases where the judge cannot in good faith recall or accurately reconstruct the relevant proceedings, order a new trial. This court will not dismiss an appeal where an appellant has established prima facie compliance with rule 5a:8(c)(1). rather, in such situations, we will remand the case to the trial judge for appropriate action as required by rule 5a:8(c)(2) or (d).

In this case, just as in Proctor, Allen V. Jaffe, the appellant established prima facie compliance, and there is nothing in the record to explain or justify why the trial judge did not comply with the requirements of rule 5a:8(c)(2) or (d) by signing the statement of facts or signing it after it was corrected to accurately recite the facts and procedural history of the case. Therefore, this court should have remanded this case to the trial court with instructions to the trial judge to sign the statement, correct the statement as needed and sign the corrected statement, or order a new trial if the judge is unable accurately to recall or reconstruct the relevant proceedings. To deny the petition for appeal because the judge thwarted the appellant's efforts to enter his statement of facts would be to grossly deny the appellant his Constitutional right under the 14th amendment to a fair and equitable hearing on the merits of his cause.

The decision of the higher court to not properly deal with the admissibility of the statement of facts has a particularly debilitating effect on an individuals right of appeal. In effect, by failing to ensure the admission of statement of facts when submission requirements are met prima facie met, then those individuals who do not engage a court reporter, even for a brief motions hearing, will find their right to appeal will be denied for lack of a transcript setting down the events of the hearing appealed from.

7. A lower court has no jurisdiction to issue final orders in a matter once that matter has been noticed foe appeal; except that an incorrect or fraudulent order may be corrected at any time by a motion and order to correct nunc pro tunc to the original date of the corrected order.

The judge while prohibited from issuing any final orders related to a matter noticed for appeal, was within her jurisdiction to correct Nunc Pro Tunc, the fraudulently prepared and erroneous order submitted by the defendant's counsel by order Nunc Pro Tunc to the date when the order was originally issued and signed.

In *Cutshaw v. Cutshaw*, 220 Va. 638, 261 S.E.2d 52 (1979) it was held that an attorney's failure to prepare an order for entry by the court, deemed to be an oversight, could be corrected by a Nunc Pro Tunc order. Code § 8.01-428(b) authorizes a trial court to correct "clerical mistakes in all judgements or other parts of the record and errors therein arising from the oversight or from the inadvertent omission." By a Nunc Pro Tunc order, *see Lamb v. Commonwealth*, 222 Va. 161, 279 S.E.2d 389 (1981); *Council v. Commonwealth*, 198 Va. 288, 94 S.E.2d 245 (1956).

The Supreme Court of Virginia "has adopted the majority view that the trial court has the inherent power, independent of statutory authority, to correct errors in the record so as to cause its acts and proceedings to be set forth correctly." In short, the court has the inherent power, independent of statute, upon any competent evidence, to make the record "speak the truth", *Netzer v. Reynolds*, 231 Va. 444, 449, 345 S.E.2d 291, 294 (1986).

When acting Nunc Pro Tunc, the court does not require jurisdiction over the case, *see Dixon v. Pugh*, 244 Va. 539, 543, 423 S.E.2d 169, 171 (1992), rather, the trial court merely corrects the record by entry of an order Nunc Pro Tunc, under the accepted fiction that the order relates back to the dare of the original action of the court "now for then".

The Supreme Court of Virginia improperly rejected the relevance of equal protection principles in denying legitimacy of the appellant's motion and order to correct Nunc Pro Tunc and in so doing served to defeat his right of appeal.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted. And this matter returned to the lower court for trial on the merits of the cause.

Respectfully submitted,

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